

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LEE HENRY BERRY,

Petitioner,

Case No. 05-20048

v

Honorable Thomas L. Ludington
Magistrate Judge Patricia Morris

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING
PETITIONER'S MOTION TO VACATE SENTENCE, DENYING MOTION TO
APPOINT COUNSEL, DENYING MOTION TO AMEND, DENYING A CERTIFICATE
OF APPEALABILITY, AND DENYING PERMISSION TO PROCEED IN FORMA
PAUPERIS ON APPEAL**

On June 16, 2014, filed a motion to vacate his sentence and recalculate it to accord with his conclusions. ECF No. 132. He asserts that he received ineffective assistance of counsel and that he is entitled to relief based on "actual innocence." *Id.* On July 21, 2014, he also filed a Motion to Amend his motion to vacate, asserting that he should be resentenced because the Court used impermissible sources to determine the nature of his prior convictions. ECF No. 138. That same day, he also filed a motion to appoint counsel. ECF No. 137.

I

On September 9, 2014, Magistrate Judge Patricia Morris issued a report recommending that (1) Berry's motion to vacate be denied, (2) his motion to amend be denied, and (3) his motion to appoint counsel to be denied. Judge Morris concluded that Berry's motion to vacate is properly construed as a motion pursuant to § 2241 petition, and therefore this Court lacks jurisdiction over the petition. ECF No. 140 at 4. Moreover, Judge Morris did not recommend

transferring the petition to the appropriate district because Berry's claims are not cognizable. Finally, Judge Morris recommended that Berry's motion to amend and his motion to appoint counsel be denied. *Id.*

Although the Magistrate Judge's report explicitly stated that the parties to this action may object to and seek review of the recommendation within fourteen days of service of the report, neither Plaintiff nor Defendant filed any objections. The election not to file objections to the Magistrate Judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal.

II

Before Berry may appeal this Court's dispositive decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying that standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.* at 336-37. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254.

Berry has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability is not warranted in this case. Furthermore, Berry should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. *See* Fed. R. App. P. 24(a).

III

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation (ECF No. 140) is **ADOPTED**.

It is further **ORDERED** that Berry's Motion to Vacate (ECF No. 132) is **DENIED**.

It is further **ORDERED** that Berry's Motion to Appoint Counsel (ECF No. 137) is **DENIED**.

It is further **ORDERED** that Berry's Motion to Amend (ECF No. 138) is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that *in forma pauperis* status on appeal is **DENIED**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: September 30, 2014

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail and on Lee Henry Berry #05032039, McKean Federal Correctional Institution, Inmate Mail/Parcels, P.O. Box 8000, Bradford, PA 16701 by first class U.S. mail on September 30, 2014.

s/Tracy A. Jacobs
TRACY A. JACOBS